

Background

The HIPAA legislation **Health Insurance Portability and Accountability Act (HIPAA) of 1996 (P.L.104-191) amended** serves as a significant means of protecting the privacy of individual health care records. The amended law provides a means of redress for those who felt their health care records had been illegally accessed, and provides a means for a vigorous investigation of alleged violations of the law.

In August 2006 Mr. David McCann filed a complaint with HHS OCR. In his complaint he cited the illegal access to his drug records by the County of Summit, its drug provider Caremark, and the Cleveland, Ohio based Center for Families and Children (Ease @ Work).

The complaint came on the heels of a series of activities perpetuated by a County of Summit elected official and his political appointees. The egregious activities began in February 2006; activities that were aimed at destroying the public service career of Mr. McCann, an employee of the County of Summit.¹ In his complaint Mr. McCann cited the illegal access of the drug records - the information used as pretense to order Mr. McCann to see a psychiatrist; an order Mr. McCann refused to follow. He was fired from his job with the County of Summit in June, 2006.²

In October 2006, the Office of Civil of Civil Rights was to have begun their investigation. Their work was completed in July and August 2009.

In October 2009 Mr. McCann requested, under the guidelines of the FOIA, all records related to the OCR investigation. The records consist of 1217 pages of documentation.

Thirty one (31) pages were denied with the HHS FOI/Privacy Acts Division Director citing

5 United States Code 552 sections (b) (5); (b) (6); and (b) (7) (c)

¹ Mr. McCann filed complaints with the Ohio Civil Rights Commission in February 2006 against Karen Margaret Doty JD, Jill Hinig-Skapin, and Linda Sowa Phelps; complaints later investigated by the United States Equal Employment Opportunity Commission (EEOC) - in their findings they could not determine, one way or the other, whether prejudicial acts had taken place

Summit County ordinance 2004-596 expressly prohibits retaliation against anyone filing a complaint of discrimination.

The ordinance was ignored by members of the Executive's politically appointed staff, members of County Council (three of whom were in attendance at a 6 March 2006 County Council meeting where Mr. McCann's strenuously expressed his concerns about retaliatory behavior - and three now serve as members of the judiciary); and the Prosecutor's Office Anita Davis JD

² In an April 2007 hearing before Richard Skovron, JD, Ohio Unemployment Compensation Review Commission, Mr. McCann was denied unemployment benefits. In a February, 2007 call placed by county officials to the Ohio UCRC, Mr. McCann was cited as a "security risk".

Discussion:

The agency is reminded of the reason for the enactment of the FOIA – the Congress wanted to

“pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.”

Rose v. Department of the Air Force 495 F.2d 261

The FOIA requires government agencies to make their records available to the public.

More recently, in January 2009, in separate messages, President Obama offered an insight to his thinking on the FOIA.

On 21 January 2009 as cited in ***74 FR 4683*** the President wrote:

“In our democracy the FOIA Act, which encourages accountability through transparency is the most prominent expression of a profound national commitment to ensuring open Government.”

And separately, as cited in ***74 FR 4685***, the President wrote:

“Openness will strengthen our democracy and promote efficient and effectiveness in Government.”

The HHS OCR denied Mr. McCann access to 31 pages of important documents that speak to the HHS OCR investigation.

Mr. McCann seeks, through the administrative hearing process, to reverse the agency’s decision to withhold access to 31 pages of critical information – information that would bring to the light of public scrutiny how the agency reached a decision where parties cited in Mr. McCann’s complaint were found not to be culpable.

This appeal is made under the guidelines of ***45 CFR 5.34***

Discussion

Exemption 5 USC 552 (b) (5)

This section does not apply to matters that are inter-agency or intra agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency

The portions of inter/intra agency documents are to be segregated with a determination of what may or may not be made public.

When the beast of political intrigue rears its ugly head, then deliberations seeking to repel the beast need to be made public.

HHS FOIA has not been consistent. Some documents of agency discernment are made public; but those affecting the cases of Mr. McCann are hidden.

The HHS OCR had no problem in releasing documents that point to agency activities as “triaging” the cases; or assigning red flags to case review; or providing email correspondence with notations as “I need this file ASAP”; or to assist a county entity in the creation of a HIPAA education program - which heretofore had not been a part of its educational curriculum.

How thoughtful of the HHS OCR to assist the County; on the other hand, how tragic documents relating to the decision making process regarding Mr. McCann’s cases are denied the scrutiny of public review.

Were decisions that Mr. McCann’s complaints based on fact or conjecture?

If the decisions were based on fact – what facts did the agency use to base their decisions?

Critical to this discussion is how judgments are rendered – are such judgments based upon the accumulation of information (what information?) and testimony (is it the truth?).

The HHS OCR had no problem in releasing the voluminous information **provided by Mr. McCann** for public scrutiny but, and significantly, would not release information that featured the testimony of county officials that were critical in the decision making process

Without access to the decision-making process how can it be determined whether a decision is based upon the truthful testimony of witnesses or was there is a philosophy of pursing **expediency** in concluding an investigation?

McCann Case Number 2010-0065mb
3 of 8

Commentary featured in public forums is less than flattering for the HHS OCR.

It would seem appropriate to counter such unflattering comments, the HHS OCR would jump at the opportunity to enhance its public image by showing it to be agency doing the work of the taxpayers in a deliberate and honest fashion.

Featured at the end of this commentary is a list of public officials involved in the decision making process – their participation points to what?

Policy about the HIPAA had been established; so no new policy was being established.

It is in the decision making process – and documents that speak to how a decision is made – would allow the agency to show its full compliance with what President Obama has written.

A dedicated career public servant should have no fear in having their work “see the light of day” as knowledgeable citizens will recognize an honest discernment process.

But if there was lack of due diligence, and investigations are completed for the sake of expediency – the public also has the right to know that as well.

The agency is reminded of **18 USC 1001 and the need for truthful testimony from witnesses**; and how can the agency decision be analyzed without public disclosure. How is an opinion developed?

Significantly, who provided testimony? How was testimony analyzed? Was truthful testimony given to government officials ? How did the testimony affect the decision making process? What was the timetable for making a judgment?

Exemption 5 USC 552 (b) 6

Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy

In all instances, when being subjected to the most egregious behavior by politically appointed public officials, Mr. McCann has consistently sought the airing of his grievances in a public forum; whether in Akron (Ohio) Municipal Court - Small Claims Division; county, state, and federal agencies; and in the media.

While Mr. McCann appreciates the sensitivity of the agency to ensure his personal privacy; however, and most significantly, given the egregious behavior of public officials against him- it has been important, to him, that all information be made public to include *Mr. McCann's professional, and personal medical history. He has nothing to hide. Nothing.*

McCann Case Number 2010-0065mb
4 of 8

Accordingly and in keeping with the spirit of ***Nix v. United States 572 f.2d 998*** the agency is urged to make the information public.

"medical treatment administered to him was not exempt from disclosure under this section under clause exempting "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," since inmate himself was seeking disclosure (emphasis added)."

Exemption 5 USC 552 (b) (7) (c)

Could reasonably be expected to constitute an unwarranted invasion of personal privacy

What constitutes an unwarranted invasion of personal privacy.

*The higher the rank of public official alleged to have engaged in misconduct **the greater the legitimate public interest in disclosure to be** (emphasis added) so that documents are less likely entitled to protection under freedom of Information Act (FOIA) Exemption 7C protecting records for law enforcement, but only to extent that production could reasonably expected to constitute unwarranted invasion of personal privacy.*

Providence Journal Company v. Department of the Army. 981 F.2d 552

By the records provided to Mr. McCann, only two witnesses from the County of Summit were asked to provide testimony in this case - Kenneth Jones, CPA, and Michelle Smith.

The agency is again reminded the release of these records provides for a proper accounting of the
the individual testimony to the HHS OCR investigating official, Kurt Temple, JD.

Was the testimony by high ranking Summit County political appointees truthful and in keeping with the spirit of **18 USC 1001**? Or was the HHS OCR, after almost three years and after repeated inquiries by Mr. McCann, more interested in the expedient closure to its investigation.*

The attorneys to the case should be reminded of the ABA Model Code of Professional Conduct

EC 7-14 ABA Rules for Professional Conduct)

*A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a **full and fair record** (emphasis added), and he should not use his position or the economic power of the government to harass parties or to bring about **unjust settlements or result** (emphasis added).*

Interestingly, The HHS FOIA had no problem in making public the transcriptions of testimony of countless government employees (County of Summit) whose comments of endorsement of Mr. McCann's action against the County of Summit might endanger their careers.

* In his original complaint, Mr. McCann cited the three organizations that were a party to his allegations: The County of Summit, Caremark and Ease @ Work of the Cleveland, Ohio based Center for Families and Children

Conclusion

For all of the legal precedent; for all the Freedom of Information Act is to provide – there are 31 pages of undisclosed testimony and “decision making” commentary by HHS officials.

And those 31 pages, to my way of thinking, are the equivalent, from the 1970’s, of an infamous
“18 and ½ minute gap”.

The question remains – will this “18 and ½ minute gap” be filled by the forthright disclosures by the United States Department of Health and Human Services?

McCann Case Number 2010-0065mb
6 of 8

Citations:

45 CFR 5.34

PL 104-191 amended

74 Federal Register 4683
74 Federal Register 4685

18 USC 1001

Rose v. Department of the Air Force 495 F.2d 261
Providence Journal Company v. Department of the Army. 981 F.2d 552
Nix v .United States 572 F.2d 998

United States Department of Health and Human Service (Present and past employees of the agency)

Assistant Secretary for Public Affairs Jenny Backus

Deputy Assistant Secretary for Public Affairs (Media) Vicki Rivas- Vazquez, JD

Director FOI/Privacy Acts Division Robert Eckert

The Honorable Michael Leavitt

Daniel Levinson, JD

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Thomas Sowinski

Lamont Pugh III

Paul Swanson

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Sherene Vann

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Gloria Ellis

McCann Case Number 2010-0065mb
7 of 8

United States Department of Labor

The Honorable Elaine Chao

Byron Zuidema

United States Senate

The Honorable George Voinovich

State of Ohio Unemployment Compensation Review Commission

David Kubli

Richard Skovron, JD

EJ Thomas

Kenny DeLaney

Sylvester Patton

CVS/Caremark

Ellen Hodge

Diane Nobles

Center for Families and Children (Ease@Work)

Fred Blevins, LPCC

Deb Hershfield, LISW

County of Summit, Ohio

Present and former members of the County of Summit Government

James B. McCarthy

Dawna "Jill" Hinig Skapin

Karen Doty, JD

Kasie Briggs JD

David Nott, JD

Lisa Okolish Miller, JD

Brian Harnak, JD

Linda Sowa Phelps

Brian Nelsen, CPA

Ken Jones, CPA

Leonard Foster

Michelle Smith

McCann Case Number 2010-0065mb

8 of 8

TO : Vicki Rivas- Vazquez, JD
Deputy Assistant Secretary for Public Affairs (Media)

FROM : David McCann - 1130 Terrell Drive - Akron, Ohio 44313
email: boniface.fulda@gmail.com

RE : Case Number 2010-0065mb
Request/release of documents

Date : Monday 5 April 2010

Sent by United States Postal Service Certified Mail

In accordance with the guidelines set out by the 16 March 2010 letter of Freedom of Information Act/Privacy Acts Division Director Robert Eckert, please find my commentary in support of the release of 31 pages of documents withheld by your agency.

This appeal is made under the guidelines of **45 CFR 5.34**

Attachment: Copy - Letter of 16 March 2010 from
Freedom of information Act/Privacy Acts Division Director Robert
Eckert

Copy - email from
Freedom of information Act/Privacy Acts Division Director Robert
Eckert

Photocopy of Letter of Transmittal/Commentary/Attachments:

- ✓ Acting General Counsel David Cade
- ✓ Assistant Secretary for Public Affairs Jenny Backus
- ✓ Freedom of information Act/Privacy Acts Division Director Robert Eckert